

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
EASTERN WASHINGTON REGION  
STATE OF WASHINGTON

KITTITAS COUNTY CONSERVATION  
COALITION, RIDGE, AND FUTUREWISE  
(KCCC), WASHINGTON STATE DEPARTMENT  
OF COMMERCE (COMMERCE)

Petitioners,

v.

KITTITAS COUNTY,

Respondent,

And,

BUILDING INDUSTRY ASSOCIATION OF  
WASHINGTON (BIAW), CENTRAL  
WASHINGTON HOME BUILDERS  
ASSOCIATION (CWHBA), MITCHELL  
WILLIAMS, d/b/a MF WILLIAMS  
CONSTRUCTION CO., TEANAWAY RIDGE,  
LLC, KITTITAS COUNTY FARM BUREAU, SON  
VIDA II, LP

Intervenors,

And,

ART SINCLAIR and BASIL SINCLAIR,

Amicus Parties.

**Case Nos. 07-1-0004c and 07-1-0015**

**COMPLIANCE ORDER  
[Post Court Remand]**

**I. SYNOPSIS**

The Board finds and concludes that Kittitas County has achieved compliance with the Growth Management Act on several issues relating to the Rural Element of the Kittitas

1 County Comprehensive Plan. The Board also finds and concludes, however, that Kittitas  
2 County is in continuing non-compliance with respect to Rural Element Measures to protect  
3 Rural Character as required by RCW 36.70A.070(5)(c).

## 4 5 **II. BURDEN OF PROOF**

6 After the Board has entered a finding of non-compliance, the local jurisdiction is given  
7 a period of time to adopt legislation to achieve compliance.<sup>1</sup> After the period for compliance  
8 has expired, the Board is required to hold a hearing to determine whether the local  
9 jurisdiction has achieved compliance.<sup>2</sup> For purposes of Board review of the comprehensive  
10 plans and development regulations adopted by local governments in response to a non-  
11 compliance finding, the presumption of validity applies and the burden is on the challenger  
12 to establish that the new adoption is clearly erroneous in view of the entire record before the  
13 board and in light of the goals and requirements of this chapter.<sup>3</sup>

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15 In order to find the County's action clearly erroneous, the Board must be "left with the  
16 firm and definite conviction that a mistake has been made."<sup>4</sup>

17  
18 Within the framework of state goals and requirements, the Board must grant  
19 deference to local governments in how they plan for growth:

20 The legislature intends that the board applies a more deferential standard of  
21 review to actions of counties and cities than the preponderance of the  
22 evidence standard provided for under existing law. In recognition of the broad  
23 range of discretion that may be exercised by counties and cities consistent  
24 with the requirements of this chapter, the legislature intends for the board to  
25 grant deference to counties and cities in how they plan for growth, consistent  
26 with the requirements and goals of this chapter. Local comprehensive plans  
27 and development regulations require counties and cities to balance priorities  
28 and options for action in full consideration of local circumstances. The  
29 legislature finds that while this chapter requires local planning to take place  
30 within a framework of state goals and requirements, the ultimate burden and  
responsibility for planning, harmonizing the planning goals of this chapter,  
and implementing a county's or city's future rests with that community.<sup>5</sup>

31 <sup>1</sup> RCW 36.70A.300(3)(b).

32 <sup>2</sup> RCW 36.70A.330(1) and (2).

<sup>3</sup> RCW 36.70A.320(1), (2), and (3).

<sup>4</sup> *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

<sup>5</sup> RCW 36.70A.3201.

1 In sum, during compliance proceedings the burden remains on the Petitioner to  
2 overcome the presumption of validity and demonstrate that any action taken by the County  
3 is clearly erroneous in light of the goals and requirements of Chapter 36.70A RCW (the  
4 Growth Management Act).<sup>6</sup> Where not clearly erroneous and thus within the framework of  
5 state goals and requirements, the planning choices of the local government must be granted  
6 deference.  
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### 8 III. PROCEDURAL HISTORY

9 On February 8, 2007, Kittitas County Conservation, Ridge, and Futurewise  
10 (hereinafter "KCCC") filed a Petition for Review in Case No. 07-1-0004c.  
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12 On February 27, 2007, the Washington State Department of Commerce (then  
13 Washington State Department of Community, Trade, and Economic Development,  
14 hereinafter "Commerce") filed its Petition for Review in Case No. 07-1-0004c.  
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16 On September 24, 2007, Kittitas County Conservation, Ridge, and Futurewise filed a  
17 Petition for Review in Case No. 07-1-0015.

18 On August 20, 2007, the Board issued its Final Decision and Order in Case No. 07-1-  
19 0004c. The Board issued its Final Decision and Order in Case No. 07-1-0015 on March 21,  
20 2008. Between August 7, 2008, and July 28, 2011, the Board issued six compliance orders  
21 in Case No. 07-1-0004c.

22 On July 28, 2011, the Washington Supreme Court upheld prior Board rulings finding  
23 noncompliance with certain GMA requirements relating to protecting rural areas and water  
24 resources.<sup>7</sup>  
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26 On September 23, 2011, Kittitas County Superior Court affirmed the Board's finding  
27 that the County remained out of compliance as to the City of Kittitas Urban Growth Area,  
28 Legal Issues 6 and 14 in Case No. 07-1-0004c. On July 28, 2011, the Washington Supreme  
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<sup>6</sup> RCW 36.70A.320(2).

<sup>7</sup> *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144 (2011).

1 Court upheld prior Board rulings finding noncompliance with certain GMA requirements  
2 relating to protecting rural areas and water resources.<sup>8</sup>

3 On November 7, 2011, the Board issued an Order Following Remand from  
4 Washington State Supreme Court, acknowledging compliance as to Case No. 07-1-0004c,  
5 Issue 8 (Airport Overlay) and finding continuing non-compliance as to Legal Issues 1, 6, 10,  
6 11, and 14 (Case No. 07-1-0004c) and also continuing non-compliance as to Legal Issues  
7 1, 2, 3, 4, 6, and 7 (Case No. 07-1-0015).

9 On November 21, 2013, Legal Issue 4 in Case No. 07-1-0015 (pertaining to rural  
10 domestic water availability) was placed on a separate compliance schedule to allow time for  
11 the Yakima Basin Groundwater Work Group formed by the Department of Ecology to  
12 address issues related to the use of water in Kittitas, Yakima, and Benton Counties.

13 On February 11, 2013, Kittitas County adopted Ordinance 2013-001 in an effort to  
14 address issues of GMA noncompliance.<sup>9</sup>

16 On April 1, 2013, the Board held a telephonic Compliance Hearing, with Presiding  
17 Officer Raymond L. Paoella and Board members Charles Mosher and Nina Carter present.  
18 The parties were represented as follows: Tim Trohimovich represented Petitioners Kittitas  
19 County Conservation Coalition, Ridge, and Futurewise; Kristin Mitchell represented  
20 Petitioner Washington State Department of Commerce; Neil Caulkins represented  
21 Respondent Kittitas County; and Katherine Kennison represented the City of Kittitas.

#### 23 IV. APPLICABLE LAW

24 **Comprehensive Plan Rural Element:** RCW 36.70A.070 provides in pertinent part  
25 that the Comprehensive Plan shall include a Rural Element with certain applicable  
26 provisions:  
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28 The comprehensive plan of a county or city that is required or chooses to  
29 plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive  
30 text covering objectives, principles, and standards used to develop the  
31 comprehensive plan. The plan shall be an internally consistent document and  
32 all elements shall be consistent with the future land use map. A

<sup>8</sup> *Kittitas County Superior Court Case No. 11-2-00158-2.*

<sup>9</sup> Seventh Statement of Actions Taken to Comply, *Ex. A* (February 11, 2013).

comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

Each comprehensive plan shall include a plan, scheme, or design for each of the following:

. . .

(5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element:

(a) Growth management act goals and local circumstances. Because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.

(b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

(c) Measures governing rural development. The rural element shall include measures that apply to rural development and protect the rural character of the area, as established by the county, by:

(i) Containing or otherwise controlling rural development;

(ii) Assuring visual compatibility of rural development with the surrounding rural area;

(iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;

1 (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface  
2 water and groundwater resources; and

3 (v) Protecting against conflicts with the use of agricultural, forest, and mineral  
4 resource lands designated under RCW 36.70A.170.

5 WAC 365-196-425(3)(a) provides:

6 The rural element should provide for a variety of densities that are consistent  
7 with the pattern of development established in its definition of rural character.  
8 The rural comprehensive plan designations should be shown on the future  
9 land use map. Rural densities are a range of densities that:

10 (i) Are compatible with the primary use of land for natural resource  
11 production;

12 (ii) Do not make intensive use of the land;

13 (iii) Allow open space, the natural landscape, and vegetation to predominate  
14 over the built environment;

15 (iv) Foster traditional rural lifestyles, rural-based economies, and  
16 opportunities to both live and work in rural areas;

17 (v) Provide visual landscapes that are traditionally found in rural areas and  
18 communities;

19 (vi) Are compatible with the use of the land by wildlife and for fish and wildlife  
20 habitat;

21 (vii) Reduce the inappropriate conversion of undeveloped land into sprawling,  
22 low-density development;

23 (viii) Generally do not require the extension of urban governmental services;

24 (ix) Are consistent with the protection of natural surface water flows and  
25 ground water and surface water recharge and discharge areas; and

26 (x) Do not create urban densities in rural areas or abrogate the county's  
27 responsibility to encourage new development in urban areas.  
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1        **Urban Growth Areas:** The GMA provides each county shall designate Urban Growth  
2 Areas (UGAs) “within which urban growth shall be encouraged and outside of which growth  
3 can occur only if it is not urban in nature.”<sup>10</sup> Each county shall include designations of UGAs  
4 in its comprehensive plan (CP).<sup>11</sup>

5        The GMA contemplates that cities and counties will work together and shall attempt  
6 to reach agreement on the correct **size** for a UGA.<sup>12</sup> A county’s UGA designation “cannot  
7 exceed the amount of land necessary to accommodate the urban growth projected by OFM,  
8 plus a reasonable land market supply factor.”<sup>13</sup>

9        The GMA prescribes the method for determining the correct size for an UGA. RCW  
10 36.70A.110(2) provides in pertinent part as follows (emphasis added):

11        Based upon the growth management population projection made for the  
12 county by the Office of Financial Management (OFM), the county and each  
13 city within the county shall include areas and densities sufficient to permit the  
14 **urban growth that is projected to occur** in the county or city **for the**  
15 **succeeding twenty-year period** . . . As part of this planning process, each  
16 city within the county must include areas sufficient to **accommodate the**  
17 **broad range of needs and uses that will accompany the projected urban**  
18 **growth** including, as appropriate, medical, governmental, institutional,  
19 commercial, service, retail, and other non-residential uses. . . an urban  
20 growth area determination may include a reasonable land market supply  
21 factor and shall permit a range of urban densities and uses. In determining  
22 this market factor, cities and counties may consider local circumstances.  
23 Cities and counties have discretion in their comprehensive plans to make  
24 many choices about accommodating growth . . . .

25        “Urban Growth” refers to growth that makes intensive use of land for the location of  
26 buildings, structures, and impermeable surfaces to such a degree as to be incompatible with  
27 the primary use of land for the production of food, other agricultural products, or fiber, or the  
28 extraction of mineral resources, rural uses, rural development, and natural resource lands.<sup>14</sup>

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31 <sup>10</sup> RCW 36.70A.110(1).

32 <sup>11</sup> RCW 36.70A.110(6).

<sup>12</sup> RCW 36.70A.110(2).

<sup>13</sup> *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 352 (2008).

<sup>14</sup> RCW 36.70A.030(19).

1 “Land market supply factor” refers to “the estimated percentage of net developable  
2 acres contained within a UGA that, due to idiosyncratic market forces, is likely to remain  
3 undeveloped over the course of the twenty-year planning cycle.”<sup>15</sup>

4 RCW 36.70A.115 provides in pertinent part as follows (emphasis added):

5 Counties and cities . . . shall ensure that, taken collectively, adoption of and  
6 amendments to their comprehensive plans and/or development regulations  
7 provide **sufficient capacity of land suitable for development** within their  
8 jurisdictions to accommodate their **allocated housing and employment**  
9 **growth**, including the accommodation of, as appropriate, the medical,  
10 governmental, educational, institutional, commercial, and industrial facilities  
11 related to such growth, as adopted in the applicable countywide planning  
12 policies and **consistent with the twenty-year population forecast** from the  
office of financial management.

13 The UGA sizing standard requires the County designate no more than the amount of  
14 land necessary to accommodate the 20-year urban growth projection, plus a reasonable  
15 land market supply factor.<sup>16</sup> Once a petitioner challenges a county’s UGA designation, the  
16 county must “show its work” to analyze and compute the appropriate amount of UGA  
17 acreage. Consistent with the OFM 20-year population forecast, the “projected urban  
18 growth” must include residential uses together with a broad range of non-residential needs  
19 and uses (e.g., commercial, industrial, service, and retail).

20 Typically, the appropriate size of an UGA is determined by preparing a “land capacity  
21 analysis” or a “land quantity analysis”.<sup>17</sup> That analysis determines how much land should be  
22 included within an UGA to accommodate expected urban development, based on the OFM  
23 population projections. Thus, the Land Capacity Analysis seeks to balance the supply of  
24 developable land with the demand for such land over the 20-year planning horizon.  
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32 <sup>15</sup> *Thurston County* at 352.

<sup>16</sup> *Id.*

<sup>17</sup> *Kittitas Co. Conservation v. Kittitas Co.*, EWGMHB Case No. 07-1-0004c, FDO p. 65 (Aug. 20, 2007).



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## V. DISCUSSION AND BOARD ANALYSIS

### A. Case No. 07-1-0004c Issues 1 and 11

Issue 1: Does Kittitas County's failure to review and revise the comprehensive plan to eliminate densities greater than one dwelling unit per five acres in the rural area (outside of limited areas of more intense rural development (LAMIRDs and Urban Growth Areas)), failure to adopt rural policies and designations that protect natural resource lands from incompatible development, failure to define rural character and to adopt provisions to protect rural character, inadequate or absent criteria for the designation of rural land use designations, failure to adopt a policy to prohibit urban governmental services outside the urban growth area, and failure to review and revise the rural element to comply with the GMA violate RCW 36.70A.020 (1-2, 5, 8-10, 12), 36.70A.040, 36.70A.070, 36.70A.110, 36.70A.120, 26.70A.130, and 36.70A.177? [Issue submitted by KCCC Petitioners]

Issue 11: By amending its Comprehensive Plan without providing for a variety of rural densities, and without providing sufficient specificity and guidance on rural densities to prevent a pattern of rural development that constitutes sprawl, has Kittitas County failed to provide for a variety of rural densities, failed to protect rural character, and otherwise failed to comply with RCW 36.70A.070(5)? [Issue submitted by Petitioner Commerce]

### Variety of Rural Densities – RCW 36.70A.070(5)(b)

In 2011, the Washington Supreme Court ruled that Kittitas County must include something in its Comprehensive Plan that provides for a variety of rural densities.<sup>18</sup> The Supreme Court said a Comprehensive Plan that is silent on the provision of a variety of rural densities (and other protective measures for rural areas) effectively allows rezones that circumvent the GMA.<sup>19</sup>

KCCC Petitioners argue that the Comprehensive Plan Rural Element, as amended by Kittitas County Ordinance 2013-001, fails to differentiate between the Rural Residential, Rural Working, and Rural Recreational land use designations. KCCC Petitioners further assert that these three designations allow densities of one dwelling unit per five acres and

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<sup>18</sup> *Kittitas County* at 170.

<sup>19</sup> *Id.* at 169.

1 even higher densities in a cluster plat.<sup>20</sup> According to KCCC Petitioners, the Rural Element  
2 of the Comprehensive Plan, as recently amended, still fails to provide for a variety of rural  
3 densities.

4 Petitioner Washington State Department of Commerce states that the Rural Element  
5 of the Comprehensive Plan amendments is supported by the required written record, does  
6 not allow urban densities in the rural area, and protects rural character. Based on its review  
7 of Kittitas County's efforts, the agency's concerns have been substantially addressed, and  
8 Commerce therefore has no objection to a finding of compliance on Issue 11.<sup>21</sup>  
9

10 The Board notes that the County conducted a public process to obtain citizen views  
11 of Kittitas County's "Rural Character" which included questionnaires, webpage postings, and  
12 open houses for the general public. Most citizens attending open houses were in favor of  
13 maintaining 5 acre and 20 acre zones indicating that such zones sustain the "Rural  
14 Character" within Kittitas County. In addition, these citizens were not in favor of 3 acre  
15 zoning and indicated that such zones reduce the quality of "Rural Character." Numerous  
16 comments were made at the public hearings indicating that the use of Planned Unit  
17 Developments, Performance-Based Cluster Plats and One-Time Splits resulted in urban  
18 densities within rural areas, and were not appropriate within Kittitas County.<sup>22</sup>  
19

20 The County Commissioners determined that existing three-acre zones (R-3 and Ag-  
21 3) were not compatible with Rural Character and therefore should be eliminated from rural  
22 designated areas and eliminated from zoning maps outside LAMIRDs and UGAs.<sup>23</sup> The  
23 County also took action to eliminate Performance-Based Cluster Platting, eliminate the One-  
24 Time split, and significantly amend the Planned Unit Development provisions.<sup>24</sup>  
25

26 The 2013 amendments to the County's Comprehensive Plan identify four rural land  
27 use designations: *Rural Residential*, *Rural Working*, *Rural Recreation*, and *Limited Areas of*  
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30 <sup>20</sup> KCCC Petitioners' Concurrence In and Objections to Findings of Compliance, pp. 4-6 (March 11, 2013).

31 <sup>21</sup> Commerce's Response to Kittitas County's Seventh Statement of Actions Taken to Comply, p. 2 (March 11,  
2013).

32 <sup>22</sup> Kittitas County Ordinance No. 2013-001, pp. 14-21.

<sup>23</sup> *Id.* at pp. 15-16.

<sup>24</sup> Seventh Statement of Actions taken to Comply, p. 3.

1 *More Intensive Rural Development* (“LAMIRDS”).<sup>25</sup> *Rural Residential* lands generally have a  
2 lower population density than urban areas but higher than most rural areas – lots are  
3 generally less than 10 acres in size, with minimum 5 acre sizes for newly established  
4 parcels. *Rural Working* lands have low population densities with larger parcel size compared  
5 to *Rural Residential* Areas. LAMIRDS allow a broader and more intense mix of uses. The  
6 density of a Master Planned Resort shall not exceed an average of one unit per acre.  
7

8 Table 8.2.4-1 on page 8-9 of the Comprehensive Plan presents the four rural land  
9 use designations and corresponding rural zoning classifications having a range of densities  
10 from as small as 2 or 3 acre lots in some LAMIRDS, to 5 acre lots in the *Rural Residential*  
11 designation, to Agriculture 20 under the *Rural Working* designation.

12 Also, revisions to County regulations were made that allow for cluster developments  
13 only if they comply with the basic housing density restrictions in the underlying zoning area  
14 (i.e., if the underlying zone is 5 acres, a cluster of 6 units would require a lot area of 30  
15 acres, with at least 60% of the property retained as open area), that restrict all housing to  
16 the underlying density restrictions in the applicable zoning areas, and that provide for an  
17 extensive review of conditional uses proposed for rural areas.  
18

19 Kittitas County has addressed the concerns raised by the Department of Commerce  
20 under that portion of Legal Issue 11 related to providing a variety of rural densities. The  
21 Board finds and concludes that Kittitas County has complied with the GMA’s requirement in  
22 RCW 36.70A.070(5)(b) to provide for a variety of rural densities. As to that portion of Legal  
23 Issue 11 pertaining to providing a variety of rural densities, Kittitas County is now in  
24 compliance with the Growth Management Act.  
25

26 **Measures to Protect Rural Character – RCW 36.70A.070(5)(c)**

27 In 2011, the Washington Supreme Court ruled that Kittitas County must include in its  
28 Comprehensive Plan “Measures” that protect the Rural Character of the area. The Court  
29 went on to say: “portions of the Plan relating to the protection of rural areas almost  
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<sup>25</sup> Seventh Statement of Actions taken to Comply, *Ex. A*, Ordinance No. 2013-001, p. 8-8.

1 exclusively consist of aspirational principles, not imperatives. As such, the Plan violates the  
2 GMA by failing to include required measures to protect rural areas.”<sup>26</sup>

3 In requiring these Measures to protect Rural Character, the Legislature intended to  
4 prevent harm to the public interest resulting from “uncoordinated and unplanned growth”  
5 which the Legislature found to “pose a threat to the environment, sustainable economic  
6 development, and the health safety, and high quality of life enjoyed by residents of this  
7 state.”<sup>27</sup>

8  
9 The Court cited examples of policy language in the Comprehensive Plan such as  
10 rural character “*will be encouraged*” and methods to prevent sprawl “*should be*”  
11 investigated. The Court found this type of language to constitute aspirational policies that do  
12 not actually require or assure protection of rural character.<sup>28</sup> The Court said “there must be  
13 some protections in place to limit development so it is consistent with rural character and not  
14 characterized by urban growth.”<sup>29</sup>

15  
16 The Board notes that the recently amended Plan policies have aspirational language  
17 that does not actually require or assure protection of rural character. Examples in the Rural  
18 Element include:

19 GPO 8.3: The County should promote the retention of its overall character  
20 by establishing zoning classifications that preserve rural character identified  
21 to Kittitas County.

22 GPO 8.57: Encourage landowners and developers to approach project  
23 design in a flexible and creative manner to provide for and protect open  
24 space and visual gratification.

25 GPO 8.59: Encourage creative development which provides for public and  
26 private recreational activity while preserving rural character.<sup>30</sup>

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30 <sup>26</sup> Kittitas County at 164.

31 <sup>27</sup> RCW 36.70A.010.

32 <sup>28</sup> Id. at 163-164.

<sup>29</sup> Kittitas County at 167.

<sup>30</sup> Seventh Statement of Actions taken to Comply, Ex. A, Ordinance No. 2013-001, pp. 8-2 and 8-14  
[Emphasis Added].

1 One example of imperative language is found in a portion of GPO 8.72: "overall MPR  
2 density shall not exceed an average of one unit per acre." However, the Rural Element  
3 consists primarily of aspirational principles, not imperatives, relating to the first two types of  
4 measures required by RCW 36.70A.070(5)(c): (i) containing or otherwise controlling rural  
5 development and (ii) assuring visual compatibility of rural development with the surrounding  
6 rural area.

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8 As to the third type of protective measure required by RCW 36.70A.070(5)(c)(iii), the  
9 Rural Element does not identify measures to reduce the "inappropriate conversion of  
10 undeveloped land into sprawling, low-density development in the rural area." Instead of  
11 adopting measures that prevent inappropriate sprawl in the rural area, the Rural Element  
12 merely contains aspirational language that does not assure protection of rural character. For  
13 example, GPO 8.17 states:

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15 Land use development and conservation tools to prevent sprawl within the  
16 Rural area will be researched and adopted when it is determined that such  
17 tools protect the unique Kittitas County rural character.<sup>31</sup>

18 Researching and adopting protective measures at some unspecified future time is  
19 merely an aspirational principle and does not satisfy the requirements of the GMA for  
20 imperatives to protect rural character, as recently interpreted and amplified by the Supreme  
21 Court in its 2011 decision remanding this case.<sup>32</sup> Potential future protective measures do  
22 not constitute currently effective measures required by the GMA to limit rural development  
23 activities in order to protect rural character.

24 Similarly, the Rural Element does not identify any measures to protect surface water  
25 and groundwater resources, as required by RCW 36.70A.070(5)(c)(iv). Required protective  
26 measures for surface water and groundwater resources are particularly significant in light of  
27 the Supreme Court's 2011 decision that the County "must regulate to some extent to assure  
28 that land use is not inconsistent with available water resources."<sup>33</sup> The Supreme Court  
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32 <sup>31</sup> *Id.* at p. 8-7 [Emphasis Added].

<sup>32</sup> *Kittitas County* at 164.

<sup>33</sup> *Id.* at 178.

1 reiterated that Kittitas County “is required to plan for the protection of water resources in its  
2 land use planning.”<sup>34</sup>

3 For example, GPOs 8.30, 8.39, 8.94, and 8.95 refer to water systems and facilities in  
4 certain land use designations but there are no adopted measures to limit rural development  
5 activities in order to protect surface water and groundwater resources throughout the  
6 County’s rural areas.<sup>35</sup>

7  
8 The Board recognizes the ongoing efforts of the Yakima Basin Groundwater Work  
9 Group formed by the Department of Ecology to address issues related to the use of water in  
10 Kittitas, Yakima, and Benton Counties. Measures to protect surface water and groundwater  
11 resources also relate closely to Legal Issue 4 in Case No. 07-1-0015 (pertaining to rural  
12 domestic water availability).

13 Finally, the Rural Element does not identify measures to protect against conflicts with  
14 the use of resource lands designated under RCW 36.70A.170, as required by RCW  
15 36.70A.070(5)(c)(v). For example, GPO 8.5 states “[r]ural lands adjacent to resource lands  
16 may require buffering.” GPO 8.9 states that protecting resource lands “shall be given  
17 priority” and that development adjacent to resource lands “shall be properly managed.” GPO  
18 8.28 states that clustering of development “is encouraged” to protect against “conflicts with  
19 the use of farming or resource lands.”<sup>36</sup> These aspirational and vague policies do not limit  
20 development activities to protect against conflicts with the use of resource lands.  
21

22 KCCC Petitioners have satisfied their burden of proof regarding the Measures  
23 required to protect the Rural Character of the area. After reviewing Ordinance No. 2013-  
24 001, the Board finds that the amended Rural Element lacks directive language to require or  
25 assure that Rural Character is protected using the five types of measures prescribed by  
26 RCW 36.70A.070(5)(c).  
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28 The Board finds and concludes as follows:  
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32 <sup>34</sup> *Id.* at 179.

<sup>35</sup> Seventh Statement of Actions taken to Comply, *Ex. A*, Ordinance No. 2013-001, pp. 8-11 through 8-19.

<sup>36</sup> *Id.* at pp. 8-3 and 8-10 [Emphasis Added].

- Ordinance No. 2013-001 fails to include “Measures” to protect the Rural Character of the area required by RCW 36.70A.070(5)(c).
- The Board is left with the firm and definite conviction that a mistake has been made in not adopting imperatives to protect the Rural Character but instead adopting aspirational principles.
- Ordinance No. 2013-001 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA, with respect to the absence of required Measures to protect Rural Character.

**B. Case No. 07-1-0004c Issues 6 and 14**

Issue 6: Does Kittitas County’s urban growth area expansions for Kittitas and Ellensburg urban growth areas including 06-03 (Kevin Gibb), 06-04 (Ronald and Douglas Gibb), and 06-13 (Teanaway Ridge LLC., et al.) violate RCW 36.70A. 020 (1-2, 5, 8-10, 12), 36.70A.040, 36.70A.050, 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.115, 36.70A.120, 36.70A.130, and 36.70A.170?

Issue 14: By expanding the UGAs for the City of Kittitas and the City of Ellensburg without conducting a land capacity analysis that shows more land is needed for urban development over the statutory planning horizon, and without developing a capital facilities plan to show how the expanded UGAs would be provided with adequate public facilities, has Kittitas County failed to comply with RCW 36.70A.070(3), .110 and .130?

KCCC Petitioners state in their brief that they do not object to a finding of compliance on this issue for the City of Kittitas and thus are not challenging this aspect of the ordinance. Ordinance No. 2013–001, Findings 145 through 152, indicate that the City of Kittitas land capacity analysis in 2012 was in error relating to the amount of residential lands within the City’s UGA to accommodate the expected growth per OFM projections. The 2012 land capacity analysis revised some of the earlier findings and shows that existing land within the current UGA is not large enough to provide the number of housing units needed to accommodate projected population and employment growth. Therefore, the Kittitas County Commissioners have determined that the expanded Urban Growth Area for the City of Kittitas corresponds to the amount of additional land needed to accommodate OFM

1 projected population growth.<sup>37</sup> The Board finds and concludes that Kittitas County is now in  
2 compliance with the Growth Management Act as to Legal Issues 6 and 14 in Case No. 07-1-  
3 0004c.

4 **C. Case No. 07-1-0004c Issue 10**

5 In their filed brief, KCCC Petitioners do not provide any legal argument for this Issue  
6 10. Instead Petitioners indicate that review and revision of Kittitas County's development  
7 regulations is analyzed in the Case No. 07-1-0015 issues.<sup>38</sup> Under WAC 242-03-590(1),  
8 failure by a party to brief an issue shall constitute abandonment of the unbrieffed issue.  
9 Therefore, the Board deems Issue 10 to have been abandoned in Case No. 07-1-0004c as  
10 KCCC Petitioners indicate that it is analyzed in Case No. 07-1-0015. Issue 10 is dismissed.

11 **D. Case No. 07-1-0015 Issue 1**

12 Does Kittitas County's failure to eliminate densities greater than one dwelling  
13 unit per five acres in rural areas outside of the urban growth areas and  
14 limited areas of more intensive rural development (LAMIRDs) in chapters  
15 16.09, 17.08, 17.12, 17.22, 17.24, 17.28, 17.30, and 17.56 Kittitas County  
16 Code (KCC) violate RCW 36.70A.020 (1-2, 8-10, 12), 36.70A.040,  
17 36.70A.070, 36.70A.110 and 36.70A.130?

18 By its terms, this issue is limited in its factual scope to "densities greater than one  
19 dwelling unit per 5 acres in rural areas" outside of UGAs and LAMIRDS. In the compliance  
20 report, Kittitas County states:

21 Densities greater than one dwelling unit per 5 acres has been eliminated  
22 from rural areas outside of LAMIRDs . . . The protection of rural character  
23 has been accomplished by, among other things, the elimination of three-acre  
24 zoning, increased criteria for conditional uses, limitation of certain previously  
25 permitted uses, significant amendment to the Planned Unit Development  
26 provisions, elimination of performance-based cluster platting, elimination of  
27 the one-time split and intervening ownership provisions.<sup>39</sup>

28 Ordinance No. 2013-001 contains several findings that support the elimination of  
29 three-acre zoning in the rural areas:  
30

31  
32 <sup>37</sup> Seventh Statement of Actions taken to Comply, Ex. A, Ordinance No. 2013-001, pp. 25-27.

<sup>38</sup> KCCC Petitioners' Concurrence In and Objections to Findings of Compliance, p. 14.

<sup>39</sup> Seventh Statement of Actions taken to Comply, p. 3.



1 31. Existing 3-acre zones within the current Zoning Code has resulted in  
2 spotted development that will diminish the rural character of the land.

3 32. Elimination of the 3 acre zones in the Rural designated lands will not  
4 impact lot sizes that already exist and are legally recorded.

5 33. After considerable amount of deliberation, Kittitas County determined that  
6 existing 3-acre zones (R-3, and AG-3) were not compatible with rural  
7 character and therefore, should be eliminated from Rural-designated areas,  
8 and finds that the R-3 and AG 3 zones should be deleted from the Rural  
9 designations on zoning maps outside LAMIRDs and UGAs.

10 Petitioners argue, however, that the Forest and Range, Rural 5, and Commercial  
11 Agriculture zones allow urban densities (greater than one dwelling unit per 5 acres) when  
12 used in conjunction with the cluster plat and conservation plat provisions, and also that  
13 these higher densities are inconsistent with Kittitas County's rural character.<sup>40</sup>  
14

15 In its brief, Kittitas County asserts:

16 Neither Forest and Range nor Commercial Ag can have cluster platting (KCC  
17 16.09.025). While both can have Conservation Platting, neither can exceed  
18 the underlying density (KCC 16.09.040(2)(A) and 16.09.040(3)(A)). Similarly,  
19 while Rural 5 can have cluster platting (though not Conservation platting)  
20 such too may not exceed the density of the underlying zone (KCC  
21 16.09.040(2)(A) and 16.09.040(3)(A)). Density is defined as units per acre  
22 (KCC 17.08.197) and so building a duplex or multi-family structure will not  
23 allow an end run around the limitation (If one has land zoned in 5-acre  
24 density and one wishes to build a duplex--a permitted use--one will need 10  
25 acres in that zoning designation to do so). Neither cluster nor conservation  
26 plats may exceed 6 units and the remainder must remain in open space in  
27 perpetuity (KCC 16.09.040(3)(B)). Hence, in none of these designations  
28 could densities be created greater than one dwelling unit per five acres and  
29 hence, the GMA is not violated.<sup>41</sup>

30 Kittitas County Code 16.09.040(2)(A) and 16.09.040(3)(A) respectively state that  
31 cluster plats and conservation plats are subject to a requirement that they do not exceed the  
32 density permitted by the zone in which the development is located. After reviewing this  
record, the Board finds that there is substantial evidence to support the County's

<sup>40</sup> KCCC Petitioners' Concurrence In and Objections to Findings of Compliance, pp. 14-28.

<sup>41</sup> Reply to Response to Seventh SATC, p. 5 (emphasis added).

1 interpretation of its own ordinances to the effect that in none of these three rural  
2 designations could densities be created greater than one dwelling unit per five acres.

3       Petitioners have failed to satisfy their burden to show clearly erroneous action on the  
4 part of Kittitas County in enacting that portion of Ordinance 2013-001 relating to Case No.  
5 07-1-0004c Issue 10 and Case No. 07-1-0015 Issue 1. By eliminating three-acre zoning,  
6 together with other related ordinance changes, Kittitas County has brought itself into  
7 compliance with the GMA as to Issue 10 in Case No. 07-1-0004c and also as to Issue 1 in  
8 Case No. 07-1-0015.  
9

#### 10       **E. Case No. 07-1-0015 Issue 2**

11       Does Kittitas County's failure to prohibit urban uses and urban development  
12 in rural areas in chapters 16.09, 17.12, 17.29, and 17.36 KCC and the failure  
13 to include standards to protect the rural area violate RCW 36.70A.020 (1-2,  
14 8-10, 12), 36.70A.040, 36.70A.070, 36.70A.110, and 36.70A.130?

15       Under this Issue 2, Petitioners do not carry forward from the issue statement any  
16 legal arguments under RCW 36.70A.110 and RCW 36.70A.130; they limit their arguments  
17 to "Measures" required to protect Rural Character under RCW 36.70A.070(5)(c) and the  
18 definitions of "urban growth" and "rural character" under RCW 36.70A.030. Moreover,  
19 Petitioners present arguments in their brief relating to the standards for the three types of  
20 LAMIRDs. The Board cannot, however, consider these LAMIRD arguments at this time  
21 because Kittitas County did not amend that portion of its Comprehensive Plan or  
22 Development Regulations pertaining to LAMIRDs. If Petitioners wish to present a failure to  
23 act claim or a failure to review and revise claim relating to LAMIRDs, then they must  
24 specifically plead those claims and file a PFR within 60 days after the date for which there  
25 was a statutory duty to take action.  
26  
27

28       In the analysis of Issues 1 and 11 in Case No. 07-1-0004c (above), the Board  
29 determined that Ordinance No. 2013-001 fails to include "Measures" to protect the Rural  
30 Character of the area required by RCW 36.70A.070(5)(c). The present Issue 2 closely  
31 relates to Issues 1 and 11 in Case No. 07-1-0004c. The Washington Supreme Court in its  
32 2011 decision remanding this case to the Board stated that the County's Development

1 Regulations are so entwined with the overarching lack of Comprehensive Plan Measures  
2 that it becomes difficult to review the Development Regulations prior to adoption of the  
3 Comprehensive Plan measures.<sup>42</sup> Accordingly, the Board will defer review of these  
4 particular Development Regulations until such time as the Comprehensive Plan Measures  
5 have been adopted. As part of the remand for Comprehensive Plan Measures to protect the  
6 Rural Character of the area, the County should also consider how its Development  
7 Regulations implement the Comprehensive Plan Measures.  
8

9 **F. Case No. 07-1-0015 Issue 3**

10 Does Kittitas County's failure to prohibit urban uses in designated agricultural  
11 lands of long-term commercial significance in chapter 17.3 KCC violate RCW  
12 36.70A.020 (1-2, 8-10, 12), 36.70A.040, 36.70A.060, 36.70A.070,  
13 36.70A.110, 36.70A.130, and 36.70A.177?

14 KCCC Petitioners argue that new schools, mining operations, and shooting ranges  
15 are allowed on agricultural lands of long-term commercial significance but there are no  
16 criteria limiting the allowed uses in ways that would ensure they do not impact resource  
17 lands. However, Petitioners do not identify any specific GMA provisions that they allege  
18 were violated here by the County's enactment of Ordinance No. 2013-001, other than a  
19 reference and quote from a 2006 Supreme Court case which cited to RCW 36.70A.060.  
20

21 Kittitas County responds by pointing out that conditional uses in the designated  
22 agricultural lands would need to meet all the criteria from KCC 17.60A.010. Subsection 7 of  
23 that code provision requires several determinations by the Board, including that the  
24 proposed use "does not compromise the long term viability of designated resource lands."  
25

26 The Board finds and concludes that KCCC Petitioners have failed to satisfy their burden  
27 to prove that a specific GMA provision was violated when the County adopted Ordinance  
28 No. 2013-001 relating to conditional uses in designated agricultural lands.

29 **G. Case No. 07-1-0015 Issue 4**

30 Does Kittitas County's failure to require that all land within a common  
31 ownership or scheme of development be included within one application for a  
32

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<sup>42</sup> *Kittitas County* at 166

1 division of land (KCC 16.04) violate RCW 36.70A.020 (6, 8, 10, 12),  
2 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.130, and 36.70A.177?

3 The Board has extended the compliance period for Issue 4 relating to water  
4 resources and will, therefore, defer ruling on this issue until the Compliance Hearing  
5 scheduled for December 2, 2013.<sup>43</sup>  
6

7 **H. Case No. 07-1-0015 Issue 6**

8 Does Kittitas County's failure in chapter 17.32, 17.40, and 17.44 KCC to  
9 have any guidelines for location of the Highway Commercial Zone and  
10 standards to protect the rural area violate RCW 36.70A.020 (1-2, 5, 8-10,  
11 12), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.130, and  
12 36.70A.177?

13 As indicated in Issue 2 of Case No. 07-1-0015 above, the Board cannot consider  
14 LAMIRD arguments at this time because Kittitas County did not amend that portion of its  
15 Comprehensive Plan or Development Regulations pertaining to LAMIRDs. If Petitioners  
16 wish to present a failure to act claim or a failure to review and revise claim, then they must  
17 specifically plead those claims and file a PFR within 60 days after the date for which there  
18 was a statutory duty to take action.

19 **I. Case No. 07-1-0015 Issue 7**

20 Does Kittitas County's failure to require GMA-compliant rural and resource  
21 land densities when parcels are subdivided through the County's "onetime  
22 split" process in chapters 17.29 and 17.31 KCC violate RCW 36.70A.020 (1-  
23 2, 5, 8-10, 12), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.110,  
24 36.70A.130, and 36.70A.177?

25 Kittitas County has eliminated the one-time split provisions from the A 20 Agriculture  
26 And the Commercial Agriculture Zone. Petitioners recommend that the Board find Kittitas  
27 County in compliance on this issue. The Board finds and concludes that Kittitas County is in  
28 compliance with the GMA on Case No. 07-1-0015, Issue 7.

29 **J. Zoning Maps**

30 KCCC Petitioners allege the Residential, Residential 2, Agriculture 3, Agriculture 20,  
31 Rural 3, Rural 5, Limited Commercial, General Commercial, Highway Commercial, Light  
32

<sup>43</sup> Second Order Granting Motion for Extension of Compliance Hearing (May 28, 2013).

1 Industrial, General Industrial, Forest and Range, and PUD zones do not meet the  
2 requirements for Type I, II, or III LAMIRDs.<sup>44</sup> As discussed previously, the Board cannot  
3 consider these LAMIRD arguments at this time because Kittitas County did not amend that  
4 portion of its Comprehensive Plan or Development Regulations pertaining to LAMIRDs. If  
5 Petitioners wish to present a failure to act claim or a failure to review and revise claim  
6 relating to LAMIRDs, then they must specifically plead those claims and file a PFR within 60  
7 days after the date for which there was a statutory duty to take action. With regard to the  
8 zoning map itself, KCCC Petitioners allege the map “cannot apply those zones to  
9 LAMIRDs.” However, KCCC Petitioners did not cite any statutes nor argue that the zoning  
10 map fails to comply with a specified GMA provision. Accordingly, KCCC Petitioners failed to  
11 satisfy their burden to demonstrate clearly erroneous action by Kittitas County as to this  
12 issue.  
13  
14

## 15 VI. INVALIDITY

16 RCW 36.70A.302(1) provides:

17 1) The board may determine that part or all of a comprehensive plan or  
18 development regulations are invalid if the board:

19 (a) Makes a finding of noncompliance and issues an order of remand under  
20 RCW 36.70A.300;

21 (b) Includes in the final order a determination, supported by findings of fact  
22 and conclusions of law, that the continued validity of part or parts of the plan  
23 or regulation would substantially interfere with the fulfillment of the goals of  
24 this chapter; and  
25

26 (c) Specifies in the final order the particular part or parts of the plan or  
27 regulation that are determined to be invalid, and the reasons for their  
28 invalidity.

29 A determination of invalidity can only be issued if the Board finds Kittitas County's  
30 adoption of Ordinance 2013-001 fails to comply with the GMA and that continued validity of  
31

32 <sup>44</sup> KCCC Petitioners' Concurrence In and Objections to Findings of Compliance, pp. 56-57.

a “particular part or parts of the plan or regulation” would substantially interfere with the fulfillment of the GMA’s goals.

Petitioners have requested a determination of invalidity in this case but Petitioners have not identified any particular part or parts of the plan or regulation that should be invalidated as substantially interfering with the fulfillment of the goals of the GMA. Under these circumstances, the Board cannot find that continued validity of a particular part or parts of the plan or regulation would substantially interfere with the fulfillment of the GMA's goals. Petitioners' request for a determination of invalidity is denied.

## VII. ORDER

The Board finds and concludes that Ordinance No. 2013-001 fails to include “Measures” to protect the Rural Character of the area required by RCW 36.70A.070(5)(c), and the Board determines that in this respect, Ordinance No. 2013-001 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.

Kittitas County has brought itself into compliance with the Growth Management Act, and the Board rescinds invalidity, as to the following issues:

- Case No. 07-1-0004c Issue 6
- Case No. 07-1-0004c Issue 10
- Case No. 07-1-0004c Issue 14
- Case No. 07-1-0015 Issue 1
- Case No. 07-1-0015 Issue 7

Issues 1 and 11 in Case No. 07-1-0004c are remanded to Kittitas County, and the County is ordered to bring its Comprehensive Plan and Development Regulations into compliance with the Growth Management Act according to the following schedule:

Due Date	Item
October 28, 2013	Compliance Due
November 12, 2013	Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record
November 26, 2013	Objections to a Finding of Compliance
December 6, 2013	Response to Objections
<b>December 16, 2013 10:00 a.m.</b>	<b>Compliance Hearing – Telephonic Call 1-800-704-9804 and use pin 5721566#</b>

DATED this 31<sup>st</sup> day of May, 2013.

\_\_\_\_\_  
Raymond L. Paoella, Board Member

\_\_\_\_\_  
Charles Mosher, Board Member

\_\_\_\_\_  
Nina Carter, Board Member